

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1703

Cir. Ct. No. 1992CF921180

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLARENCE CHRISTOPHER JOSEPH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Clarence Christopher Joseph appeals an order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06. Joseph argues that he received constitutionally ineffective assistance from his trial lawyer because his lawyer should have called a third-party eyewitness to testify at

his trial. Joseph also argues that his lawyer should have objected to the prosecutor's factual errors and improper argument during closing argument. We affirm.

¶2 Joseph was convicted of first-degree intentional homicide after a jury trial nearly twenty years ago. At trial, Joseph argued that he did not intend to kill Dion Taylor, the victim, but shot Taylor to defend himself and his friend Michael Sullivan, whom Taylor was attempting to rob at gunpoint. Joseph pursued a direct appeal, but did not raise the issues currently before us. We affirmed the judgment of conviction. In 2013, Joseph brought this postconviction motion, arguing that his trial lawyer violated his constitutional rights by ineffectively representing him. The circuit court denied the motion without a hearing.

¶3 To establish a claim of ineffective assistance of counsel, a defendant must show both that his lawyer's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court need not address both components of this test if it concludes that the defendant has made an insufficient showing as to one of the components. *Id.* at 697. To establish that a lawyer's performance was deficient, the defendant must show that acts or omissions of his lawyer "were outside the wide range of professionally competent assistance" in light of all the circumstances. *Id.* at 690. We strongly presume that a lawyer has "made all significant decisions in the exercise of reasonable professional judgment." *Ibid.* To establish that he was prejudiced by his lawyer's deficient performance, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Ibid.*

¶4 Joseph first argues that his trial lawyer ineffectively represented him because he did not call Karl Thiel to testify at trial. Thiel was a patron at a nearby bar who did not know either Joseph or Taylor, the victim. Thiel provided a statement to the police about what he saw and heard the night of the shooting. In an affidavit attached to Joseph’s postconviction motion, Thiel averred that if he had been called as a witness:

I would have testified that, at the time of the shooting, I was a patron at another bar nearby. I heard gunshots coming from the street, and ran to the door. I observed a black man across the street, walking in an easterly direction but turning his head and speaking to another black man on the corner. The man on the corner said something to the effect of, “you shot him” and the man who had been walking away responded something to the effect of, “don’t worry, he’s not dead.” I noticed another man lying on the ground. The man at the corner then responded to the effect that he should stay there and fight, but the man who was walking kept walking away.

Joseph contends that this testimony would have supported his assertion that he did not intend to kill Taylor because he believed Taylor was still alive after the shooting, and he did not attempt to harm Taylor further. Joseph contends that Thiel’s statement would also have bolstered his credibility because it corroborates his testimony that Taylor’s cousin, Edward Lawson, urged him to stay and “fight like a man,” but that he left instead.

¶5 Joseph’s argument is unavailing because he cannot show that he was prejudiced by his lawyer’s failure to call Thiel to testify. The fact that Thiel overheard Joseph saying that Taylor was alive as Joseph was fleeing the scene does not mean that Joseph did not intend to kill Taylor. Joseph may have intended

to kill Taylor, but believed he had not succeeded. Joseph may have believed that Taylor *was* dead, but said otherwise so that Taylor's cousin would not prevent him from leaving the scene. Or, Joseph may have made the remark because he wanted to make it appear that he did not intend to kill Taylor. The remark was of limited evidentiary value to the jury in determining Joseph's state of mind with regard to the shooting because Joseph could have made the comment for any number of reasons. Thiel's proffered testimony is insignificant in the context of all of the evidence adduced at trial. Joseph cannot show that there is a reasonable probability that the result of the proceeding would have been different if his lawyer had called Thiel to testify.

¶6 Joseph next argues his trial lawyer should have objected to factual errors and improper argument by the prosecutor during closing argument. To place the prosecutor's remarks in context, we briefly summarize some of the trial testimony. Joseph testified that he and his friends, Michael Sullivan, Robert Cashaw and Derrick Everett, met at a bar. After about an hour, they decided to leave. Joseph testified that he waited outside with Sullivan while Everett went to get the car. He saw Lawson, Taylor's cousin, give Taylor a gun. Joseph testified that he heard Lawson tell Taylor, "I'm going to give you the gun, you can do what you want with it." Joseph testified that Taylor replied, "Yeah, I could use some jewelry, anyway."

¶7 Joseph testified that Taylor approached him and Sullivan and pointed the gun at his stomach. Taylor patted him down, but missed a gun Joseph carried in his back waistband. Joseph said that Taylor told him not to move and turned toward Sullivan, pointing the gun at him and attempting to grab the gold chains around Sullivan's neck. Joseph testified that he feared for his life and for

Sullivan's life because Sullivan was resisting Taylor's attempt to rob him, and he knew Taylor was a member of a violent street gang.

¶8 Joseph testified that one of Taylor's friends called out to Taylor, causing him to turn. Joseph testified that he pulled out his gun and shot Taylor. After the first shot, Taylor was still standing, pointing the gun at Sullivan, so Joseph pulled the trigger again. Joseph testified that two or three more shots rang out in rapid succession, although he did not intend to fire that many shots. Joseph testified that he was not trying to kill Taylor, he was just trying to stop Taylor from harming them. Joseph testified that he then fled the scene on foot, although Taylor's cousin, Lawson, told him to stay and fight.

¶9 Sullivan testified that he was with his friends at the bar and saw Taylor about fifteen minutes before they decided to leave. Sullivan said that he and Taylor had gotten into an argument the day before and he was concerned Taylor might try to start a fight. Sullivan testified that he was standing outside with Joseph, while Everett went to get the car so they could leave, when Taylor approached him and Joseph. Sullivan testified that Taylor first pointed the gun at Joseph and patted him down for weapons. Sullivan testified that Taylor then turned to him, pointed the gun at him, and grabbed the jewelry around his neck. Taylor looked over his shoulder when one of his friends called out to him, at which point Joseph shot him.

¶10 Cashaw testified that he was standing near Everett's car when he saw Taylor pointing a gun at Sullivan's head. Cashaw testified that Taylor was attempting to grab the gold chains around Sullivan's neck. Cashaw said that Taylor also pointed the gun at Joseph and patted him down. Cashaw testified that Taylor was turning back toward Sullivan when Joseph shot him. In response to a

question from the prosecutor, Cashaw explained that Taylor was not walking away when he was shot; he had just turned his body away.

¶11 Everett testified that he was in his car outside the bar when he saw Taylor confronting Sullivan and Joseph, who were twenty-five to thirty feet away from him. Everett testified that he saw Sullivan slap Taylor's hand away. Everett said that he then saw that Taylor was pointing a gun at Sullivan and then saw Sullivan unhook his chains to give to Taylor. Everett testified that someone called out to Taylor at that point. As Taylor was turning toward the person who called him, back in Joseph's direction, Joseph shot him.

¶12 In his closing argument, the prosecutor argued that Everett's testimony differed greatly from the testimony of Joseph, Sullivan and Cashaw. The prosecutor argued that Everett's testimony differed from his friends because he was not with them when they fabricated the "story" of what occurred later in the evening after the shooting. As conceded by the State, the prosecutor made several errors in recounting Everett's testimony to the jury in support of this theory. The prosecutor incorrectly told the jury that Everett testified that Taylor was walking away when Joseph shot him. Everett actually testified that Taylor was turning away, not walking away. The prosecutor incorrectly told the jury that Everett testified that he did not see Taylor point the gun at either Sullivan or Joseph. Everett actually testified that he saw the gun pointed at Sullivan, but did not see the gun pointed at Joseph. The prosecutor incorrectly told the jury that Everett testified that there was "no robbery" and "no talk about jewelry." Everett actually testified that Taylor had his hands on the gold chains Sullivan wore around his neck and that Sullivan initially slapped his hands away, but then removed the chains while Taylor pointed a gun at him.

¶13 Joseph’s lawyer performed deficiently by failing to object to the prosecutor’s incorrect statements about Everett’s testimony. Joseph is not, however, entitled to relief because he cannot show that he was prejudiced by his lawyer’s failure to object to the errors. Before the closing arguments began, the circuit court instructed the jury:

Remarks of the attorneys are not evidence. If the remarks implied the existence of certain facts not in evidence, disregard any such implication and draw no inference from the remarks.

Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence. Draw your own conclusions and your own inferences from the evidence.

If Joseph’s lawyer had objected to the prosecutor’s characterization of Everett’s testimony, the circuit court would have cured the error by instructing the jury to disregard the statements and would have reminded the jury that the closing arguments of the lawyers are not evidence. This remedy would have been very similar to what actually occurred. The jury was told before the closing arguments began that the arguments the lawyer made in closing were not evidence, and they were given a copy of the jury instructions to refer to during their deliberations. The prosecutor again reminded the jury that closing arguments were not evidence in his remarks. While the jury would have been told to disregard the prosecutor’s statements had Joseph’s lawyer objected, given all of the testimony at trial about what occurred before Joseph shot Taylor—and the minimal impact an instruction to disregard would have had in light of the other instructions to the jury—the error does not undermine our confidence in the outcome of the trial.

¶14 Joseph next argues that his trial lawyer should have objected to the prosecutor’s statement during closing argument that Joseph’s gun could not have

accidentally fired multiple shots. Detective Leroy Shaw testified that Joseph's gun was semi-automatic, so one bullet would fire each time the trigger was pulled. On cross-examination, Detective Shaw testified that it was possible for a gun to malfunction and fire more than one bullet at a time. During closing argument, the prosecutor argued that Joseph's gun could not fire automatically, discharging several bullets at once as Joseph claimed, pointing to Shaw's testimony that a person needed to pull the trigger each time to fire a bullet. The prosecutor acknowledged, however, that guns sometimes malfunction. The prosecutor's remarks were consistent with Shaw's testimony and completely within the bounds of permissible argument. Joseph's lawyer did not perform deficiently in failing to object to this argument.

¶15 Finally, Joseph argues that his lawyer should have objected to the prosecutor's argument that the police diagram showing where the bullet casings were found indicated that Joseph was walking toward Taylor while shooting him in the back. "The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). The prosecutor's contention was a reasonable inference that could be drawn from the diagram. Therefore, Joseph's lawyer did not perform deficiently in failing to object to it.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

